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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 214

In the Matter of
BRIGANTINE BEACH HOTEL CORPORATION,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX

PAGE

Petition for Certiorari 1

Summary Statement of Matters Involved 2

Jurisdictional Statement 3

Question Presented 3

Reasons Relied on for Allowance of Writ 4

BRIEF IN SUPPORT OF PETITION

Opinion of the Court Below 5

Question Presented 5

Statement of the Case 5

Specification of Errors 5

Argument 5

Point 1 6

Point 2 6

Point 3 7

Point 4 8

TABLE OF CASES CITED

PAGE

Bergeron v. Mansour (1st Cir.), 152 Fed. (2) 27, 1945 6

Diamond Laundry Corp. v. California Employment Stabilization Commission, 9th Cir. 162 Fed. (2) 398, p. 402 (1947) 8

Fernow vs. Liberty Royalties Corp. (10th Cir.), 146 Fed. (2) 396 (1944) 8

Goggin v. Bank of America National Trust and Saving Association (9th Cir.), 186 Fed. (2), 158, 161-162 (1951) Cer. denied 314 U. S. 931 7

Hovey v. McDonald, 109 U. S. 150 (1883) 6

In re Technical Marine Maintenance Co. (3rd Cir.), 169 Fed. (2) 548, 551-552 (1948) 6

In re Woodruff, 9th Cir., 121 Fed. (2) 152 (1941) 8

Jordan v. Federal Farm Mortgage Corp. (8th Cir.). 152 Fed. (2) 642 Cert. denied 66 S. Ct. 1339, 328 U. S. 821, 90 L. Ed. 1601, Cer. dismissed 66 S. Ct. 1340, 328 U. S. 852, 90 L. Ed. 1624 6

Midland Terminal Ry. Co. v. Warriner (8th Cir.), 294 Fed. 185 (1923) 6

OTHER AUTHORITIES

Act of June 25, 1948, C. 646, 62 Stat. 928; 28 U. S. C. A. Sec. 1254 3

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1952.

No.

In the Matter of:

BRIGANTINE BEACH HOTEL CORPORATION,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Brigantine Beach Hotel Corporation, Petitioner, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, and shows:

SUMMARY STATEMENT OF FACTS.

On January 26, 1951, Brigantine Beach Hotel Corporation, the owner of a hotel at Brigantine Beach, New Jersey, filed its petition for an arrangement under Chapter XI of the Bankruptcy Act.

The plan provided for the payment of all preferred claims, the costs of administration and the payment of general creditors in full within a period of one-year from confirmation (Appendix 10a).

The plan was assented to and accepted by a majority of creditors (Appendix 11a).

On October 5, 1951, the District Court entered an order awarding fees and expenses to the Receiver, appraiser and various attorneys and directed the debtor to deposit this sum with the Court, in order to carry out the terms of the debtor's plan of arrangement (Appendix 12a).

From several of these awards the debtor took an appeal, on the ground that the allowances were not in conformity with the provisions of the Bankruptcy Act, were outside the power of the Court to grant and were otherwise excessive and unwarranted (Appendix 5a, 13a).

An attorney for creditors also took an appeal on the ground that the award to him was inadequate.

While these two appeals, filed and docketed, were awaiting ultimate disposition in the Appellate Court, the District Court, reversing its position, entered an order refusing confirmation of debtor's plan of arrangement and adjudged the debtor a bankrupt (Appendix 8a).

A petition for rehearing was denied.

Debtor then appealed from the orders adjudging debtor a bankrupt and denying the rehearing.

The Court of Appeals, on debtor's appeal on allowances, modified the District Court's order and remanded it for further action not inconsistent with its opinion. It dismissed the attorney's appeal for additional allowance. It affirmed the order adjudging the debtor a bankrupt.

A petition by the debtor for rehearing on this last appeal was denied.

It is upon this matter that this petition for certiorari is presented.

JURISDICTIONAL STATEMENT.

The opinion of the Court of Appeals was filed June 3, 1952.

Jurisdiction to issue the writ is found in the provisions of the Act of June 25, 1948, C. 646, 62 Stat. 928; 28 U. S. C. A. Section 1254.

QUESTION PRESENTED.

The question involved is, whether or not, in a proceeding under Chapter XI of the Bankruptcy Act, when an appeal from an order, made by the District Court, pursuant to a plan of arrangement, is perfected and pending in the Court of Appeals, the jurisdiction of the cause is exclusively in that Court, and while there, the District Court is wholly without power to make a second order, adjudicating the debtor a bankrupt, and destroying the plan.

REASONS FOR GRANTING THE WRIT.

(1) The decision of the Court of Appeals is in conflict with that of the Supreme Court, as well as with the 1st Circuit and also the 8th Circuit.

(2) There is now a conflict between the opinion of the Third Circuit in this case with the theory and reasoning of its own Court in a previous decision.

(3) The important question of the jurisdiction of the Court of Appeals in so far as it relates to proceedings under Chapter XI of the Bankruptcy Act requires clarification and should be settled by this Court.

(4) The judgment of the Court of Appeals affirming the District Court was erroneous.

CONCLUSION.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the United States Court of Appeals, for the Third Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case, numbered and entitled on its docket #10,690, *In re Brigantine Beach Hotel Corporation,* to the end that this cause may be reviewed and determined by this Court and that the judgment of the United States Court of Appeals, for the Third Circuit, be reversed.

BRIGANTINE BEACH HOTEL CORPORATION,

By

I. EMANUEL SAUDER,

PHILIP STERLING,

Attorneys for Petitioner.

Dated:

BRIEF IN SUPPORT OF PETITION.

OPINION OF COURT BELOW.

The opinion of the Court of Appeals is not yet reported.

QUESTION PRESENTED.

The question presented is stated in the preceding petition (page 3 hereof).

STATEMENT OF THE CASE.

This has already been presented in the preceding petition (page 2 hereof), is hereby adopted and made part of this brief.

SPECIFICATION OF ERROR.

The Court below erred: In affirming the Order of the District Court.

ARGUMENT.

(1) By reason of the Court's affirmance, there is now a conflict between the Third Circuit and the Supreme Court, as well as the First Circuit and also the Eighth Circuit.

The Court of Appeals failed to consider or to give any weight to the language of Justice Bradley, speaking for the Supreme Court, in *Hovey v. McDonald,* 109 U. S. 150 (1883), to the effect that there is one general rule in all cases, and that is that an appeal suspends the power of the Court below to proceed further in the cause (except to perfect its judgment or to correct clerical errors).

The Third Circuit disregarded the case of *Bergeron v. Mansour,* 152 Fed. (2) 1927 (1945), decided by the First Circuit, as well as the cases of *Jordan v. Federal Farm Mortgage Corp.,* 152 Fed. (2) 642, Cer. denied 66 Sup. Ct. 1339, 328 U. S. 821, 90 L. Ed. 1601, Cer. dismissed 66 St. Ct. 1340, 328 U. S. 852, 90 L. Ed. 1624 and *Midland Term. Ry. Co. v. Warriner,* 294 Fed. 185 (1923), both of which came from the Eighth Circuit, and all of which held that where appeals have been perfected, the District Court loses jurisdiction of the cause which is transferred to the Appellate Court, and thereby created a conflict which should be resolved by this Court.

(2) The decision of the Court of Appeals is in conflict with the theory and reasoning of its own Court in a previous decision.

In the case of *In Re Technical Marine Maintenance Co.,* 3rd Cir., 169 Fed. (2) 548, 551-552 (1948), the Court of

Appeals held that the taking of an appeal from the first order vested this Court with jurisdiction to hear and consider all matters and the District Judge had no power thereafter to reconsider these matters directly. That which he could not do directly, he could not do indirectly, by destroying the foundation of the whole proceeding, and yet that is what, in the instant case, the Court of Appeals, by its affirmance of the District Court, has permitted it to do.

The District Court, after making allowances to the Receiver, etc., and directing the deposit of these funds to complete the plan of arrangement, by its order of adjudication, while appeals were pending from the orders previously made, reconsidered the matter, and thus destroyed or impaired the very subject of the pending appeals and thus interfered with the Appellate Court's authority to make its jurisdiction effective.

The Court of Appeals had thus previously held that the District Court could not do this directly or indirectly and the present opinion is therefore in marked conflict with its previous ruling.

(3) The important question of the jurisdiction of the Court of Appeals in so far as it relates to proceedings under Chapter XI of the Bankruptcy Act require clarification and should be settled by this Court.

The Court of Appeals of the 9th Circuit, in the case of *Goggin v. Bank of America National Trust and Savings Association,* 186 Fed. (2) 158, 161-162 (which was also a Chapter XI proceeding), held that an appeal from the allowances of creditors' claims took with it all jurisdiction to act upon a receiver's petition to subordinate claims.

The Supreme Court denied a petition for certiorari thereon.

The same Circuit, in the case of *Diamond Laundry vs. California Employment Stabilization Commission,* 162 Fed. (2) 398-402 (1947), likewise held that where an appeal from judgment confirming an order of Referee allowing claims had been perfected, jurisdiction passed to the Court of Appeals and the District Court had no jurisdiction to entertain additional objections.

The Court of Appeals in the present case holds that the appeals on allowances even though they affect the whole plan of arrangement under Chapter XI, do not carry jurisdiction of the entire cause to the Court of Appeals.

In reaching this conclusion it fails to follow the foregoing cases but chooses instead to follow cases in the 10th Circuit, *Fernow v. Liberty Royalties Corp.*, 146 Fed. (2) 396 (1944), and in the 9th Circuit, *In re Woodruff*, 121 Fed. (2) 152 (1941), neither of which bear little resemblance to the present case. Neither were proceedings under Chapter XI; neither of them involved the entry of two diametrically opposed orders of the District Court, one of which destroys the other, while appeals were pending in the Appellate Court.

This leaves the whole question undecided and it should be settled by this Court.

(4) The judgment of the Court of Appeals affirming the District Court was erroneous.

The order of the District Court awarding fees to the Receiver, appraiser and attorneys, and directing the deposit by the debtor of sufficient moneys to effectuate and carry out the plan of arrangement proposed by it and accepted by creditors was not an interlocutory order. It was an order which carried with it confirmation or failure of the whole plan.

An appeal from that order necessarily carried with it jurisdiction of the entire cause.

A subsequent adjudication in bankruptcy in the District Court, while appeals were pending, clearly would interfere with the jurisdiction of the Appellate Court and impinge upon any order it might make therein.

It would, and did, destroy the subject of the first appeals.

The Appellate Court itself, in a footnote to its opinion (page 8), admitted that it made the question involved in the first appeal academic.

The judgment of the Court of Appeals affirming the District Court was erroneous.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power by granting a writ of certiorari directed to the United States Court of Appeals, Third Circuit, and thereafter reviewing and reversing said decision.

BRIGANTINE BEACH HOTEL CORPORATION,
By
I. EMANUEL SAUDER,
PHILIP STERLING,
Attorneys for Petitioner.

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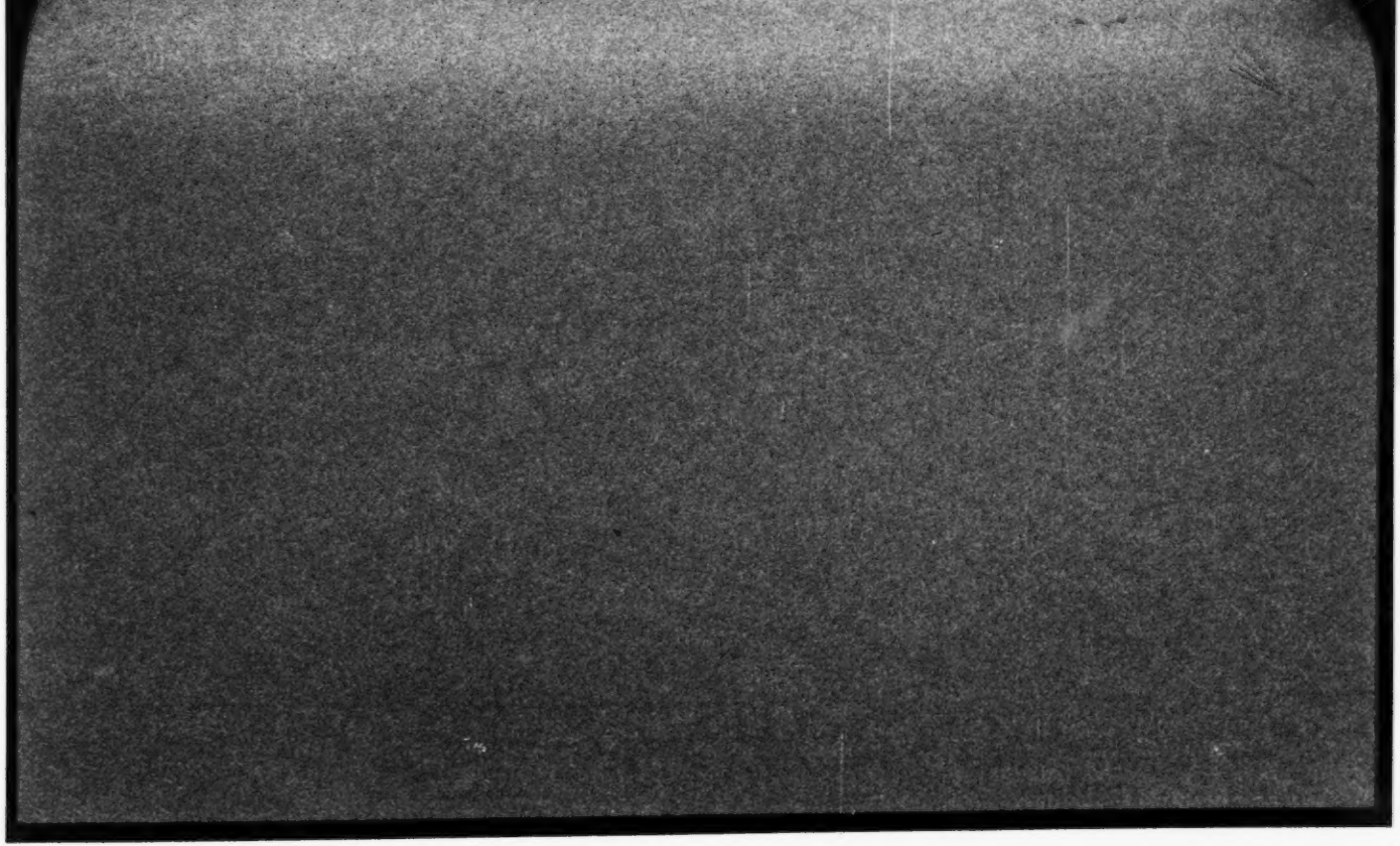
On Petition for Writ of Certiorari to the United States Court of Appeals for the 3rd Circuit.

BRIEF OF RESPONDENT CONTRA PETITION FOR CERTIORARI.

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INDEX TO BRIEF.

	Page
Supplemental Statement of Facts	2
Question Presented	3
Argument	3

TABLE OF CITATIONS.

	Page
In re Christ's Church of the Golden Rule, 9th Circuit, 172 Fed. 2nd 523	4
City of Fort Lauderdale v. Freeman, 5th Circuit, 197 Fed. 2nd 122	4
Fernow v. Liberty Royalties Corp., 10th Circuit, 146 Fed. 2nd 396	4
Hoehn v. McIntosh, 110 Fed. 2nd 199	4
Harold Taylor, Trustee, v. Harry W. Voss, Trustee, 271 U. S. 176	4
U. S. C. A. Title 11, section 47	3
U. S. C. A. Title 11, sections 701-799	3
Universal Oil Products Co. v. Cosden Petroleum Corp., 5th Circuit, 178 Fed. 2nd 495	4
In re Woodruff, 9th Circuit, 121 Fed. 2nd 152, cert. denied 314 U. S. 652	4

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On Petition for Writ of Certiorari to the United States Court of Appeals for the 3rd Circuit.

BRIEF OF RESPONDENT CONTRA PETITION FOR CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

On behalf of the creditors of above petitioner, the following answer is made to the application for a writ of certiorari herein:

The Summary Statement of Facts, submitted by petitioner, is in the main correct. It is supplemented hereafter.

The matter now submitted by petitioner for this Court's attention, is trivial, of small moment, and has been amply treated in the District Court and in the Court of Appeals, both as to law and fact. The law governing this matter is basic and well settled; there are no conflicts, and no clarification is required.

It is therefore urged that the application be denied.

SUPPLEMENTAL STATEMENT OF FACTS

On November 13, 1950, Brigantine Beach Hotel Corporation (hereinafter referred to as debtor) conveyed away all of its property and assets to Equity Corporation (which like debtor was wholly owned by one Josephson); and on December 1, 1950, Morris Bloom, attorney for creditors, filed a complaint in the New Jersey Superior Court, praying that such conveyance be adjudged in fraud of creditors, and made without consideration, that a re-conveyance be decreed, that debtor be declared insolvent and a receiver be appointed.

Both debtor and Equity Corporation appeared in response to that complaint, and offered to re-convey. This offer was adopted by judgment of the Court, which also appointed a custodial receiver; on final hearing held January 26th, 1951, the receivership was made permanent upon a finding that debtor was insolvent, and on that same day debtor filed its petition for an arrangement under Chapter XI of the Bankruptcy Act, in the United States District Court for the District of New Jersey, where a federal receiver was appointed.

The District Court, in its order of October 5, 1951, made award of fees and costs with respect to eight items, six of which have not been challenged; only the award to the receiver, and to Morris Bloom, attorney for the creditors in the proceedings before the New Jersey Superior Court, and later in the District Court, have ever been attacked, and a review sought.

Debtor failed or refused to comply with the remainder of the order of October 5, 1951, so far as it related to the deposit by it of the sum of $9,291.45, necessary to provide payment of the installment due to creditors and of the costs due under debtor's Plan of Arrangements; and for other valid reasons which appear in the order of the District Court made November 29th, 1951, the Court refused confirmation of debtor's Plan, adjudged debtor a bankrupt and directed that bankruptcy be proceeded with.

Exception being taken by debtor to all three orders of the District Court, appeals were taken in all these matters to the Court of Appeals, Third Circuit, where these matters were all argued together, and disposed of; and an application for a rehearing denied.

QUESTION PRESENTED.

The question involved is whether, in proceedings under U. S. C. A. Title 11, sections 701-799, where an insolvent debtor offers a plan of arrangement with its creditors and then fails or refuses to deposit the funds required thereunder, taking exception to the Court allowance of fees to the Receiver and to the attorney for creditors and appealing therefrom, does the taking of such a limited appeal from an administrative step in the proceedings stay and thereby paralyze the entire and further administration of the estate, no stay being applied for, no offer made to deposit funds to cover the uncontested allowances, and no offer being made to give security for the payment of the allowances in contest, should such contest prove unavailing.

ARGUMENT.

(1) In arrangement proceedings, the Court has exclusive jurisdiction of debtor and its property (section 711) and may appoint a receiver (section 732) and appraisers (section 733) and determine the amount of money necessary to pay the costs and expenses of the proceedings (section 737). There is therefore little doubt as to the right of the District Court to treat of these matters, and to reduce its conclusions to judgment.

(2) A review of these decrees is provided for in U. S. C. A. Title 11, section 47, but these matters are mere steps in the ordinary administration of the estate, administrative in character, and are treated in petition to superintend and revise. They are not strictly "appeals."

City of Fort Lauderdale v. Freeman, 5th Circuit 197 Fed. 2nd 122;
In re Christ's Church of the Golden Rule, 9th Circuit, 172 Fed. 2nd 523;
Universal Oil Products Co. v. Cosden Petroleum Corp., 5th Circuit, 178 Fed. 2nd 495;
Harold Taylor, Trustee, v. Harry W. Voss, Trustee, 271 U. S. 176.

(3) The Bankruptcy Act does not contemplate tying up an estate and prolonging administration by appeals.

Hoehn v. McIntosh, 110 Fed. 2nd 199.

And an appeal on a question of fees does not thereby remove to the Appellate Court the entire cause.

Fernow v. Liberty Royalties Corp., 10th Circuit, 146 Fed. 2nd 396;
In re Woodruff, 9th Circuit, 121 Fed. 2nd 152, cert. denied 314 U. S. 652.

MORRIS BLOOM,
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TABLE OF CONTENTS

	PAGE
Opinion of Court Below	2
Jurisdictional Statement	2
Question Presented	2
Statement of Facts	2
Summary of Argument	3
Argument	4
Conclusion	5

TABLE OF CITATIONS

Fernow v. Liberty Royalties Corp. (5th Cir.) 1944, 146 Fed. 2nd 396	4
Woodruff, in re, (9th Cir.) 1941, 121 Fed. 2d 152	3

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Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION OF COURT BELOW.

The opinion of the Court of Appeals is not yet reported.

JURISDICTIONAL STATEMENT.

Jurisdiction to issue the writ is found in provisions of the Act of June 25, 1948, C 646, 62 Stat. 928; 28 U. S. C. A. Section 1254 (1).

QUESTION PRESENTED.

The question involved is whether the filing of an appeal in an interlocutory order (the amount of fees allowed) divests, while said appeal is pending, the District Court from all jurisdiction in the administration of an estate in bankruptcy under Chapter XI.

STATEMENT OF FACTS.

On October 5, 1951, the District Court entered an order awarding fees and expenses to the Receiver and others and directed the debtor under the Chapter XI Proceedings to

deposit the fund in Court, in order to carry out the debtor's plan of arrangement. From several of these awards, debtor took an appeal.

While the appeal was pending, the District Court, after hearing, determined that the plan was not fair, equitable and feasible and the District Court entered an order adjudicating the debtor a bankrupt.

The Court of Appeals for the Third Circuit affirmed the District Court in the order adjudicating the debtor and subsequently denied a rehearing.

SUMMARY OF ARGUMENT.

The Court of Appeals did not err in affirming the order of the District Court adjudicating debtor a bankrupt. The question on appeal from the allowance of fees and expenses was not of such a fundamental question as to divest the District Court of all jurisdiction to administer the proceedings under Chapter XI.

ARGUMENT.

In re Woodruff (9th Cir.) 1941, 121 Fed. 2d 152, is authority for the statement that allowance of fees were not final judgments but were interlocutory orders only and that consequently the appeal therefrom did not preclude further proceedings in the court below.

To permit an appeal from an interlocutory order such as this on a question not fundamental to the administration of a bankruptcy case would thwart entirely the proper administration of estates in bankruptcy. If such were the case it would defeat the very plan of arrangement proposed and accepted by creditors. Of like import is the case of *Fernow v. Liberty Royalties Corp.* (5th Cir.) 1944, 146 Fed. 2nd 396.

The order appealed from with respect to fees and expenses in no wise impinged upon the jurisdiction of the District Court. Had the order appealed from been affirmed or denied, the plan of reorganization still had to be confirmed or denied. Merely allowing the estate to lie dormant pending an appeal on the question of fees and expenses would be an injustice rather than doing justice. The order of adjudication did not destroy the validity of the appeal on the order respecting fees. Debtor did not suffer any hardship thereby for it relieved the debtor of making a deposit for fees regardless of what amount was determined, that of the District Court, or the determination later made by the Court of Appeals.

The adjudication was not brought about by reason of the fees allowed, but because the court found the plan of arrangement not to be to the best interest of creditors, fair, equitable, and feasible according to the act.

There is no conflict of opinion. The Courts have repeatedly held that although the basic rule is that on perfecting an appeal the lower court is ousted of jurisdiction, nevertheless the appeal must be on a basic and fundamental issue. The issue here was merely on a minor step in the proceeding.

CONCLUSION.

It is submitted that there is no conflict but the law is settled, that an appeal filed on a minor issue will not divest the lower court of jurisdiction. The question raised on an appeal for allowances of fees and costs is a minor issue and as such does not divest the lower court of jurisdiction to determine the fundamental question.

Wherefore, your Respondent prays that the Writ of Certiorari requested in the petition be denied.

Respectfully submitted,

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SAMUEL P. ORLANDO,
Attorneys for Gene R. Mariano, Respondent-Receiver.